U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 17 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Texas Service Center (Director). The approval was subsequently revoked by the Director. The revocation decision is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The Director's decision will be withdrawn, and the petition remanded for a new decision.

The petitioner is a software consulting company. It seeks to permanently employ the beneficiary in the United States as a computer programmer and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an Application for Permanent Employment Certification, ETA Form 9089, approved by the U.S. Department of Labor (DOL).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

In the revocation decision, issued on October 31, 2012, the Director found that the evidence of record failed to confirm the beneficiary's dates of employment with the petitioner and a prior employer, . As a result, the Director determined that the record did not establish that the beneficiary had the requisite five years of experience (in conjunction with a foreign equivalent degree to a U.S. baccalaureate degree) to qualify for the job under the terms of the labor certification.

The petitioner filed a timely appeal, accompanied by a brief from counsel and supporting documentation that addresses the issue(s) of the beneficiary's dates of employment with and The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d. Cir. 2004). In view of the entire record, and particularly the materials submitted on appeal, the AAO is persuaded that the beneficiary more likely than not was employed by the petitioner and during the time periods alleged in the labor certification, as originally found by the Director. Accordingly, the AAO will withdraw the Director's decision that revoked the approval of the petition for failure of the petitioner to establish the beneficiary's dates of employment with and

The petition does not appear to be approvable, however, because the record still does not show that the beneficiary has the requisite five years of qualifying employment.

To be eligible for approval as an employment-based immigrant, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date, which is the date the underlying labor certification was accepted for processing by the DOL. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(d).

The ETA Form 9089 in this case was filed with the DOL on June 28, 2007, and certified by the DOL on August 23, 2007. Hence, the priority date of the instant petition is June 28, 2007.

The education and experience requirements for the position of (computer) programmer are specified in Part H of the ETA Form 9089. In particular:

Line 4 states that a bachelor's degree is the minimum level of education required.

Line 4-B specifies "electronics" as the major field of study.

Line 5 states that no training in the job opportunity is required.

Line 6 states that 60 months (five years) of "experience in the job offered" is required.

Line 7 states that no alternative field of study is acceptable.

Line 8 states that no alternative combination of education and experience is acceptable.

Line 9 states that a "foreign educational equivalent" is acceptable.

Line 10 states that experience in an alternate occupation is not acceptable.

Furthermore, Part J, line 21 of the ETA Form 9089 states that the beneficiary did not "gain any of his qualifying experience with the employer in a position substantially comparable to the job" offered.

As evidence of the beneficiary's education, the record includes copies of academic transcripts and a diploma indicating that he earned a Bachelor of Engineering (Electronics Communication) from India, which was conferred on November 17, 2002, following completion of an 8-semester degree program.

Assuming this degree is a "foreign educational equivalent" to a U.S. bachelor's degree in engineering, the beneficiary must also have five years of "experience in the job offered" (not including work with the petitioning company in a substantially comparable position) to qualify for the proffered position under the terms of the labor certification. Moreover, the beneficiary's five years of qualifying experience must have been completed between the time his bachelor's degree was conferred and the priority date of the instant petition to meet the regulatory requirement of five years of progressive post-baccalaureate experience to make him eligible for classification as an advanced degree professional. *See* 8 C.F.R. § 103.2(b)(l), (12) and 8 C.F.R. § 204.5(k)(2).

The beneficiary does not appear to be able to meet this five-year experience requirement since the time period between the conferral of his Bachelor of Engineering degree in November 2002 and the priority date of the instant petition, June 28, 2007, is less than five years. Furthermore, according to the ETA Form 9089 some of the experience the beneficiary did acquire during this time frame (January 5, 2006 through June 28, 2007) was with the employer/petitioner in a position whose title and job duties were identical to those of the proffered position in this petition. Since the Director

has not previously addressed these issues, the AAO will remand the petition to the Director for further consideration.

The petitioner must also establish its continuing ability to pay the proffered wage to the beneficiary from the priority date up to the present. *See* 8 C.F.R. § 204.5(g)(2). In this connection, U.S. Citizenship and Immigration Services (USCIS) records show that the petitioner has filed numerous other employment-based immigrant petitions (Form I-140) and nonimmigrant petitions (Form I-129) over the years. The petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date of the instant petition until each of the beneficiaries obtains permanent resident status. *See id.*; *see also Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). Furthermore, the petitioner must pay each I-129 (H-1B visa) beneficiary the prevailing wage in accordance with DOL regulations and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The Director's decision of October 31, 2012, is withdrawn. The petition is remanded to the Director for consideration of whether the beneficiary has five years of qualifying post-baccalaureate work experience, in accordance with the foregoing discussion. In addition, the Director may consider whether the petitioner has had the continuing ability to pay the proffered wage to the instant beneficiary, as well as to all other beneficiaries of pending and approved immigrant petitions, from the priority date of June 28, 2007 up to the present. The Director may request additional evidence from the petitioner, and prescribe a time period for its submission. A new decision will then be issued by the Director.